U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 June 2004

CASE NO.: 2004-SOX-33

IN THE MATTER OF:

ONNIE REX COKER

Complainant

v.

WAL-MART STORES, INC.

Respondent

ORDER GRANTING COMPLAINANT'S MOTION AND DENYING RESPONDENT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

This proceeding arises under the employee protective provisions of the Sarbanes-Oxley Act of 2002, technically known as the Corporate and Criminal Fraud Accountability Act, P.L. 1027-204, 18 U.S.C. § 1514A, et seq. (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, brought by Onnie Rex Coker (Complainant) against Wal-Mart Stores, Inc. (Respondent).[1]

Complainant was formerly a co-manager at one of Respondent's locations in Columbus, Mississippi, and generally alleges he was suspended and terminated in September 2003 after

[1] The enforcement procedures to be utilized under the Act are those found in 49 U.S.C. § 42121(b), which provides whistleblower protection for airline employees who provide air safety information under section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), Public Law 106-181, April 5, 2000, 49 U.S.C. 42121. See 18 U.S.C. § 1514(b)(2)(A). The AIR21 implementing regulations are found at 29 C.F.R. § 1979.100, et seq. 29 C.F.R. § 1979.100.

reporting Respondent's alleged policy of inappropriately manipulating its internal "grass roots" employee satisfaction surveys to various representatives of Respondent.[2] He filed a December 2003 complaint with Occupational Safety and Health Administration (OSHA).

In the Regional Administrator's January 30, 2004 Findings and Preliminary Order, it was determined that Complainant's claim would be dismissed because OSHA lacked jurisdiction to investigate. Specifically, it was found that Complainant's complaints about employee surveys did not constitute protected activity under the Act. On March 2, 2004, Complainant filed his Objections to Findings and Preliminary Order and Request for Hearing in which he objected to the Regional Administrator's findings and requested formal hearing before OALJ.

During a March 23, 2004 deposition, Complainant indicated that his general complaints about grass roots surveys to any of Respondent's representatives never included specific complaints that Respondent's shareholders were being or would be defrauded as a result of the survey results, nor did he specifically mention any particular securities laws being violated. Accordingly, Counsel for Respondent considered Complainant's complaint to be frivolous and informed Complainant's attorney that Respondent would seek to recover its attorney's fees and costs. (Respondent's Motion to Enforce Settlement Agreement [Resp. Motion], p. 1; Resp. Motion, exhibit "A").

According to Respondent, the parties agreed on March 24, 2004, that Complainant would voluntarily dismiss his cause of action against Respondent in exchange for the execution of a mutual general release by both parties to avoid a claim for attorney's fees and costs. Moreover, according to Respondent, after "many exchanges" between the parties via telephone, Respondent's attorney drafted a "proposed Settlement Agreement and Mutual General Release," which was forwarded to Complainant's attorney. Paragraph "3" of Respondent's "proposed" mutual release describes a "general release of claims" in which Complainant releases Respondent from any claims relating to his complaint under the Act. (Resp. Motion, p. 2; Resp. Motion, exhibits "B" and "C").

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[2] On March 2, 2004, after his December 2003 complaint was denied by OSHA, Complainant requested a formal hearing before OALJ, and a formal hearing was scheduled for April 7, 2004. On April 6, 2004, after the parties informed the undersigned settlement was reached, an Order Canceling Hearing issued.

Additionally, Respondent's "proposed" mutual release indicates Complainant releases any potential claims under a litany of other statutes, including, among other laws, the Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Equal Pay Act, and the Americans with Disabilities Act, as well as "all claims arising under federal, state, or local law involving any tort, employment contract (express or implied), public policy, wrongful discharge or any other claim." (Resp. Motion, exh. "C," p. 2).

On May 26, 2004, Complainant's attorney responded to Respondent with a "revised Settlement Agreement and Mutual General Release", which included a truncated general release encompassing only Complainant's causes of action related to any complaints under the Act. On May 27, 2004, Complainant submitted a proposed Order of Dismissal in which he sought a dismissal of his complaint with prejudice.

On May 28, 2004, after the undersigned discussed Complainant's request to dismiss his complaint with prejudice in a conference call with Counsel for Complainant and Respondent, Respondent filed its Motion to Enforce Settlement Agreement requesting this office to enter an order "enforcing the parties' settlement agreement and requiring both parties to mutually and generally release any and all claims they may have against one another." Specifically, Respondent averred its "proposed" mutual release was agreed to by the parties and should be enforced.

DISCUSSION

A. Respondent's Motion to Enforce Settlement Agreement

Respondent argues the parties' agreement to its "proposed" mutual release should be enforced because Mississippi law looks with favor upon compromise and settlement of litigation and because jurisprudence establishes that "where there is no fraud and the **parties meet on equal terms and adjust their differences**," a court will not overlook the compromise. (Resp. Motion, pp. 2-3 (citations omitted)).

Prefatorily, it is noted that the undersigned is without authority to grant the requested relief. 29 C.F.R. § 1980.113, which is consistent with 29 C.F.R. § 1979.113, provides for judicial enforcement:

> Whenever any person has failed to comply with a preliminary order of reinstatement or a final order **or the terms of a settlement agreement**, the Secretary or a person on whose behalf the order was issued may file a civil action seeking **enforcement of the order in the United States district court** for the district in which the violation was found to have occurred.

29 C.F.R. § 1980.113 (2003); 29 C.F.R. § 1979.113 (2003).

Assuming **arguendo** that this office is imbued with the authority to enforce a settlement agreement, it is noted that there is insufficient evidence establishing whether an enforceable agreement between the parties was ever reached.

General contract principles apply to settlement agreements. Estate of Kokernot v. Commissioner of Internal Revenue, 112 F.3d 1290 (5th Cir. 1997) (citing Treaty Pines Invs. Partnership v. Commissioner, 967 F.2d 206, 211 (5th Cir. 1992)). This settlement agreement involves a right to sue derived from a federal statute and, consequently, federal common law principles govern construction of the contract. Macktal v. Secretary of Labor, 923 F.2d 1150, 1157 n. 32 (5th Cir. 1991) (citing Town of Newton v. Rumery, 480 U.S. 386, 392, 107 S.Ct. 1187, 1191-92, 94 L.Ed.2d 405 (1987)); Williams v. Metzler, 132 F.3d 937 (3d Cir. 1997).

Interpretation of the contractual language is the first step towards proper construction. In the process of interpreting a contract, the court seeks to ascertain the intent of the parties. That inquiry, however, does not require a search for the subjective intent of the parties, but rather centers on the intent embodied in the language that the parties chose to memorialize their agreement. Williams, supra at 946 (internal citations omitted).[3]

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[3] The Williams court observed:

> In the oft quoted words of Justice Oliver Wendell Holmes, "the making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs -- not on the parties' having *meant* the same thing, but on their having *said* the same thing."

Williams, supra at 947 (internal citations omitted).

The Restatement (Second) of Contracts provides:

> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; **but the circumstances may show that the agreements are preliminary negotiations.**

Restatement (Second) of Contracts § 27 (1981) (emphasis added).

A review of the correspondence submitted by Respondent indicates Respondent identified its general release as a "proposed" release, which does not establish the release prepared by Respondent was intended to contemplate a final agreement. A finding that Respondent's proposed release did not contemplate an agreement is supported by language in Respondent's "Settlement Agreement and Mutual General Release," which specifically: (1) provides Complainant with 21 days to "review this agreement and general release and consult with an attorney prior to execution of this agreement and general release;" (2) contemplates "any modifications, material or otherwise made to this agreement and general release;" (3) provides for Complainant's execution of the settlement and release by attaching his signature; (4) alternatively indicates that the "terms of the **offer(s)** set forth herein will expire" if not accepted within 21 days; and (5) provides Complainant seven days to revoke the agreement from the date he signs it.

None of the submissions filed by Respondent include Complainant's signature, which suggests Complainant did not intend to be bound by Respondent's proposed release. A finding that Complainant did not manifest his intent to be bound by Respondent's release is supported by Counsel for Complainant's response to the proposed release in which Complainant limited his release to matters arising under the Act. Complainant's release is a conspicuous departure from Respondent's proposed release. Without additional evidence establishing Complainant agreed to be bound by Respondent's proposed release, I find correspondence submitted by Respondent amounts to preliminary negotiations which are not binding on any of the parties.

Further, in Macktal, supra, a case arising under analogous provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851, et seq. (the ERA), the Fifth Circuit considered a matter in which the Secretary struck a provision of a

settlement agreement but otherwise upheld the settlement and dismissed the action. 923 F.2d at 1153. The Court noted that, pursuant to Supreme Court jurisprudence, the Secretary presiding over the matter could accept the proposed settlement, obtain the consent of the parties to a modified settlement, or reject the settlement. However, in vacating and remanding the matter to the Secretary, the court noted that the Secretary **could not modify material terms of the agreement without the consent of the parties or otherwise require the parties to accept a settlement to which they had not agreed**. 923 F.2d at 1155, 1158 (citing Evans v. Jeff D., 475 U.S. 717 (1986)).

In Macktal, the Court defined a "material term" as "a term that a party could not customarily change in a private agreement without the consent of the other parties to the agreement." The Court also observed that, pursuant to Section 184(1) of the Restatement (Second) of Contracts,[4] a determination whether or not a term is "essential" requires a finding that a term is "not so unimportant that a party could add to it or delete it from a settlement agreement without the consent of the other parties. 923 F.2d at 1156 n. 25.

In the instant matter, Respondent's release compels Complainant to release any and all of his actions against Respondent under a catalog of laws in which the undersigned has no authority to render a decision. I find such a term one which a party could not customarily change in a private agreement without the consent of the other parties to the agreement. Likewise, pursuant to Section 184(1) of the Restatement (Second) of Contracts, I find Respondent's proposed release is not so unimportant that a party could add to it or delete it from a settlement agreement without the consent of the other parties. Consequently, I find Respondent's argument that the undersigned

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[4] Section 184(1) of the Restatement (Second) of Contracts provides:

> If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct **if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.**

Restatement (Second) of Contracts § 184(1) (1981).

must enforce an agreement based on its proposed settlement agreement and general release to be without merit.

Assuming **arguendo** Respondent could establish its proposed Settlement Agreement and Mutual General Release is the parties' mutual settlement agreement, it is noted the agreement fails to establish whether its terms are fair, adequate, reasonable and in the public interest. See generally Baena v. Atlas Air, Inc., ARB No. 03-008, 2002-AIR-4 (ARB Jan. 10, 2003) (in a matter arising under AIR21, the ARB approved a settlement agreement which was a fair, adequate, and reasonable settlement of the complaint) and Sebastian v. American Airlines, 2002-AIR-18 (ALJ Jan. 31, 2003); see also Macktal, supra at 1153-1154; Balog v. Med-Safe Systems, Inc., ARB No. 99-034, ALJ No. 1995-TSC-9 (ARB Sept. 13, 2000); Thompson v. U.S. Dep't of Labor, 888 F.2d 551, 556-557 (9th Cir. 1989).

29 C.F.R. § 1980.109(b) specifically provides:

> If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

29 C.F.R. § 1980.109(b) (2003). Respondent has not identified what its potential claim against Complainant might be worth, nor has Respondent requested the undersigned to determine that Complainant's complaint was frivolous.

In matters under analogous employee protection provisions of other laws, it has been held that, in reviewing a settlement agreement, the Secretary's authority over settlement agreements is limited to such statutes as are within the Secretary's jurisdiction and is defined by the applicable statute. See Poulos v. Ambassador Fuel Oil Co., Inc., 86-CAA-1 (Sec'y Nov. 2, 1987), @ 2; Williamson v. Tennessee Valley Authority, 91-ERA-16 (Sec'y Mar. 4, 1992); Brodeur v. Westinghouse Hanford Co., 92-SWD-3 (Sec'y Oct. 16, 1992); Ratliff v. Airco Gases, 93-STA-5 (Sec'y June 25, 1993). Likewise, the Secretary will not approve terms of a settlement agreement that include a waiver of the complainant's right with respect to claims that might arise in the future. See Polizzi v. Gibbs & Hill, Inc., 87-ERA-38 (Sec'y July 18, 1989).

Respondent's release generally indicates Complainant releases claims which arose prior to the agreement, but

"specifically" releases "all claims including, but not limited to, those arising under Title VII of the Civil Rights Act of 1964 . . .," which arguably appears to require Complainant to release additional unstated claims arising in the future and claims arising under other laws in which this office has no jurisdiction.

Respondent's release also includes a choice of law provision indicating the parties' agreement shall be conformed in accordance with the laws of Mississippi "without regard to its conflict of laws provision." This proceeding is grounded in a federal statute. In matters under analogous employee protection provisions of other statutes, it has been held that the Secretary, acting through the Administrative Review Board, and the federal courts will construe the settlement agreement under the statutes and regulations of the United States. See Balog, supra, @ 8; Nason v. Maine Yankee Atomic Power Co., ARB No. 99-091, ALJ No. 97-ERA-37 (ARB Mar. 20, 1998), @ 2. The Secretary and federal courts are not and cannot be bound by Mississippi law or interpretations of federal law made by Mississippi courts.

In light of the foregoing, I find insufficient evidence establishing Respondent's proposed settlement is fair, adequate reasonable, or in the public interest. Consequently, Respondent's request to enforce its agreement is **DENIED.**

B. Complainant's Request for Dismissal

29 C.F.R. § 1980.111(c) provides that, at "any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge . . . [who] will determine whether the withdrawal will be approved." 29 C.F.R. § 1980.111(c) (2003); see also 29 C.F.R. § 1979.111(c) (an identical provision under AIR21 implementing regulations).

By written submission, Complainant requests his claim be dismissed with prejudice. I construe his submission as his written request to withdraw his objections to the Regional Administrator's Findings and Preliminary Order. Upon a review of Complainant's request and for good cause shown, Complainant's request is hereby **APPROVED** with prejudice.

ORDER

Upon consideration of the foregoing,

IT IS HEREBY ORDERED that Respondent's Motion to Enforce Settlement Agreement is **DENIED**. Complainant's Motion to Dismiss with Prejudice, which has been construed as a motion to withdraw pursuant to applicable regulations, is hereby **APPROVED** with prejudice.

ORDERED this 4th day of June, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110 unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).